

(24,013)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 50.

SEVEN CASES (MORE OR LESS), EACH CONTAINING
TWELVE BOTTLES OF ECKMAN'S ALTERATIVE, ECK-
MAN MANUFACTURING COMPANY, OWNER, PLAINTIFF
IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA.

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1 Pleas Before the Honorable Judges of the District Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the September, 1913, Term Thereof.

2 Be it remembered, that on the 12th day of December, 1912, libel was filed in the office of the Clerk of said Court, which said libel is in words and figures, following, to-wit:

United States District Court, District of Nebraska, Omaha Division.
105, Civil.

UNITED STATES OF AMERICA, Plaintiff,
vs.

SEVEN CASES (More or Less), Each Containing 12 Bottles of Eckman's Alternative, Defendant.

Libel.

To the Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

The libel of the United States of America, by F. S. Howell, United States Attorney for the District of Nebraska, who in this case prosecutes in its behalf, respectfully represents as follows:

First.

This libel is filed by the United States of America, in its own right, and prays seizure for condemnation of certain articles of drugs contained in seven cases, more or less, each original case being labeled,

"Eckman's Alternative. Guaranteed by the makers to conform to all the provisions of the Food & Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory, Philadelphia, Pa.—One doz. Eckman's Alternative."

in accordance with the Act of Congress in such case made and provided, approved June 30, 1906, commonly known as The Food and Drugs Act.

3

Second.

Your libellant represents to the court that in the City of Omaha, County of Douglas, state of Nebraska, in the Omaha Division of the district of Nebraska, and within the jurisdiction of this Honorable Court, and in the possession of Richardson Drug Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, and now located and being on the premises of the said Richardson Drug Company, at 902, 904, 906, 908,

910, 912 Jackson Street, in said city, county, division and district aforesaid, are certain articles of drugs, and being of the particular description following, to-wit:

Seven cases (more or less), each case containing 12 bottles each original case being labeled as is set forth in the first paragraph of this libel.

And each of the bottles contained as aforesaid, in said seven cases (more or less) being labeled as follows:

"Eckman's Alternative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowles, and Tuberculosis (Consumption) * * * two dollars a bottle. Prepaid only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A."

And each package containing each bottle aforesaid, then and there contained a certain circular, containing the following statement:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

Third.

Your libellant represents that the said seven cases (more or less) 4 each containing 12 bottles of drugs, are illegally held, as aforesaid, within the jurisdiction of this Honorable Court, and that said article of drugs is misbranded in violation of Section eight of the Food and Drugs Act of June 30, 1906, as amended, aforesaid, and is liable to condemnation and is confiscable, as provided therein, for the following reasons, namely: the statement "effective as a preventative for pneumonia" appearing on the circular enclosed, as aforesaid, in the package containing each bottle, is false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used; and the statement "We know it has cured and that it has and will cure tuberculosis", appearing on the aforesaid circular, enclosed as aforesaid in each package containing said articles of drugs, is false, fraudulent and misleading in this to-wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption.

Four.

Your libellant further represents that all of the matters above set forth are true; that said seven cases, more or less, each containing 12 bottles, of drugs, have been transported from Chicago, in the state of Illinois, to Omaha, Nebraska, and are now located and sit-

uated upon the premises of the Richardson Drug Company, a corporation as aforesaid, in the said city of Omaha, and are now offered for sale and to be offered for sale by the said Richardson Drug Company, in violation of the Food and Drugs Act of June 30, 1906, aforesaid; that the aforesaid seven cases, more or less, 5 each containing 12 bottles of drugs were shipped on or about November 1, 1912, by Eckman Manufacturing Company, from their Chicago warehouse, in interstate commerce, to-wit, by way of the Chicago and Northwestern Railroad Company, and having been so transported remain now unsold and in original unbroken packages in the possession of the said Richardson Drug Company, at Omaha, Nebraska, and that the said article of drugs was, as aforesaid, misbranded before and at the time of said transportation, and so remains, contrary to the form of law in such case made and provided.

Wherefore, in consideration of the premises, your libellant prays:

1. That the said article of drugs, consisting of seven cases, more or less, each case containing 12 bottles, labeled as aforesaid, may be proceeded against and seized for condemnation in accordance with the said Act of Congress approved June 30, 1906, and that to this end this Honorable Court may order to issue the process of attachment in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction so far as is applicable in this case, and that said Richardson Drug Company, a corporation, and all other persons having or pretending to have any right, claim or interest in said article of drugs above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that any persons claiming an interest in said articles of drugs, if they are non residents of this district, may be cited by process of publication in the manner provided by law.

2. That by an appropriate order of this Honorable Court it may adjudge and decree that said articles of drugs, contained in said seven cases, more or less, be condemned at the suit of this libellant, according to the provisions of said Act of Congress, approved June 30, 1906.

3. That this Honorable Court may pass all such orders, 6 decrees and judgments as may be necessary in the premises, and may grant to your libellant a decree for the costs of this proceeding against the owners or holders of said articles condemned, should such costs not be satisfied out of the proceeds of the same.

4. That your libellant may have such other and further relief as the nature of the case may require.

F. S. HOWELL,
United States Attorney.

STATE OF NEBRASKA,
County of Douglas, ss:

I, F. S. Howell, being first duly sworn, on oath depose and say that I am United States Attorney for the district of Nebraska, that I have read the foregoing libel and know the contents thereof, and

that the matters therein contained are true to the best of my knowledge and belief.

F. S. HOWELL.

Subscribed in my presence and sworn to before me this 12th day of December, 1912.

[SEAL.]

R. C. HOYT,

Clerk U. S. District Court.

Endorsed: Filed Dec. 12, 1912. R. C. Hoyt, Clerk.

7 Thereupon afterwards, to-wit: At the September 1912 Term of said Court, and on the 12th day of December, 1912, order was signed and filed in said case and duly entered of record in Journal No. 1 of said Court, to-wit:—

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,

v.

SEVEN CASES (More or Less), Each Containing 12 Bottles of Eckman's Alternative, Defendant.

Order.

Now, on this 12th day of December, 1912, comes F. S. Howell, United States Attorney for the District of Nebraska, and having heretofore filed in said court on behalf of the United States a libel for the seizure, condemnation and confiscation, of seven cases, more or less, each containing 12 bottles of Eckman's Alternative, a certain article of drugs, now in the possession of the Richardson Drug Company, a corporation, in the city of Omaha, in the county of Douglas, in the Omaha Division of the District of Nebraska, and now presents said libel praying that the said article of drugs may be seized for condemnation and confiscation and may be held and dealt with as this court may order and determine, and that the usual process and monition of the court in that behalf be made, and that the court, considering said libel and application and being fully advised in the premises:

Ordered, that such of said articles of drugs, that is, such of the seven cases, each containing 12 bottles each, as may be found in the possession of the said Richardson Drug Company, a corpora-

8 tion, within the said Omaha Division of the District of Nebraska, shall be seized by the Marshal of this District and the usual attachment and monition of court be issued by the clerk of this court, to the Marshal of this district for the attachment and detention of said article of drugs, and that the marshal of this Court make service according to law and notice particularly to said Richardson Drug Company, and shall publish a citation giving notice generally to all persons having or pretending to have any right, title, interest or claim in said property, to appear before

said court in the city of Omaha, Nebraska, in said division and district, on the 13th day of January, 1913, at 10 o'clock, A. M., then and there to make known their claims and allegations in said matter, and that the said marshal publish said citation for at least three weeks, prior to said date, in *The Examiner*, of Omaha, Nebraska, a paper published and printed at Omaha, Nebraska, and in the Omaha division of said district.

W. H. MUNGER, *Judge*.

Endorsed: Filed Dec. 12, 1912. R. C. Hoyt, Clerk.

9 Thereupon afterwards, to-wit: On the 12th day of December, 1912, warrant and motion was issued in said case, and returned and filed on the 15th day of January, 1913, which said warrant and monition is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,

vs.

SEVEN CASES (More or Less), Each Containing 12 Bottles of Eckman's Alternative, Defendant.

Warrant and Motion.

The President of the United States of America to the Marshal of the District of Nebraska, Greeting:

You are hereby strictly enjoined and commanded to attach and arrest seven cases (more or less) each containing 12 bottles of Eckman's Alternative, an article of drugs, each case being labeled.

"Eckman's Alternative. Guaranteed by the makers to conform to all the provisions of the Food & Drugs Act. Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory Philadelphia, Penna. One Doz. Eckman's Alternative."

And each of the bottles contained in said seven cases aforesaid being labeled in part:

"Eckman's Alternative — contains twelve per cent alcohol by weight, or fourteen per cent by volume—used as a solvent * * * Two dollars a bottle. Prepared only by Eckman Mfg. Co., Laboratory, Philadelphia, Penna., U. S. A."

10 in the possession of Richardson Drug Company, a corporation, at 902 to 912 Jackson Street, in the city of Omaha, Nebraska, or so much thereof as you may be able to find in your district, and the same so seized you shall keep under attachment and arrest until you shall receive further order from this court, or until the same shall be discharged in due course of law, and that you cite the Richardson Drug Company, a corporation, in particular, and all persons in general who have or pretend to have any right, title or interest or claim therein, to appear before the judge of the district court of the United States for the district of Nebraska, Omaha Di-

vision, on the 13th day of January, 1913, at 10 A. M., then and there to make known their claims and allegations in said matter, and further to do and receive in this behalf as in justice shall pertain, and that you duly certify to the court what you shall do in the premises.

Witness: The Honorable W. H. Munger, Judge of the said Court and the seal thereof, hereto affixed at Omaha, in said District, on this 12th day of December, 1912.

[SEAL.]

R. C. HOYT,
Clerk U. S. District Court.

Attached to said Warrant and Motion is the Return of the Marshal which said Return is in the words and figures following, to-wit:

Return.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this Order, and Warrant and Monition, on the 12th day of December, 1912, and on the same day I served the same by seizing such of said Alternative as could be found, to-wit, thirty four bottles of Eckman's Alternative which were in the custody and possession of the Richardson Drug Company at 902-904 Jackson Street in the city of Omaha, Douglas County, Nebraska, and at the time of such seizure I gave notice to the Richardson Drug Company by reading to C. F. Weller, President of said Richardson Drug Company, and in charge of their
11 storehouse and their said business and said goods so seized, and at the same time I posted, a copy of said writ on the said goods so seized; such seizure being made in presence of H. S. Weller, Paul G. Luce and H. D. Evans, and thereupon by and with the advice and consent of the United States Attorney, and the said Richardson Drug Company, and in accordance with an agreement then and there made, I left said goods stored in the said building of the said Richardson Drug Company to await the further order of the court and took from the said Company, through C. F. Weller, President of said Richardson Drug Company, a receipt therefor, and an agreement in writing to hold said goods until the further order of said court, under my instructions and possession, which receipt and agreement is hereto attached and made a part of this return.

I also gave notice generally to all concerned, of such seizure by publishing the attached Citation for three weeks in The Examiner, a paper printed and published in Omaha, Nebraska, such Citation and proof of publication thereof are hereto attached and made a part of this return.

Dated this 13th day of January, 1913.

WM. P. WARNER,
United States Marshal,
By H. P. HAZE, *Deputy.*

The receipt and agreement referred to in the foregoing Return is in the words and figures following, to-wit:

Received from United States Marshal William F. Warner, a total of 2 5/6 Dozen (34 bottles), of a product marketed and sold as Eckman's Alternative, which 34 bottles of this product were seized by United States Marshal, William P. Warner, on December 12th, 1912, Case No. 105 Civil. We to hold same intact upon our premises and subject to the order of the court. The above 34 bottles of Eckman's Alternative being the property of the United States of America.

RICHARDSON DRUG CO., INC.,
C. F. WELLER, Pt.

12 The Proof of Publication and Citation referred to in the foregoing Return are in the words and figures following, to-wit:

Publisher's Affidavit.

STATE OF NEBRASKA,
County of Douglas, ss:

Before me, the undersigned a notary public, this day personally came Alfred Sorenson, who being first duly sworn, according to law, says that he is the publisher of The Examiner, a weekly newspaper published at Omaha, in said county and state, and that the publication, of which the annexed is a true copy, was published in said paper on the 28th day of December, 1912, and once each week thereafter for two consecutive weeks, and that the rate charged therefor is not in excess of the commercial rates charged private individuals with the usual discounts.

ALFRED SORENSON.

Subscribed and sworn to before me this 14th day of January, 1913.
[SEAL.]

STANLEY SERPAN,
Notary Public.

Legal Notice.

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,
vs.

SEVEN CASES (More or Less), Each Containing 12 Bottles of Eckman's Alternative, Defendant.

Citation.

Under and pursuant to an order in due and regular process in the above entitled cause, I did, on the 12th day of December, 1912, seize the following described property, to-wit: 34 bottles of Eckman's Alternative, the same being in the possession of the Richardson Drug

Company, a corporation, at Omaha, within the Omaha division of the district of Nebraska, each of said bottles being labeled in part:

"Eckman's Alterative.—contains twelve per cent of alcohol by weight or fourteen per cent by volume—used as a solvent. * * * Two dollars a bottle. Prepared only by Eckman's Mfg. Co. Laboratory Philadelphia, Penna. U. S. A."

13 which said 34 bottles had theretofore been shipped, in case lots of 12 bottles each, in interstate commerce, via Chicago & Northwestern Railway Company, from Chicago, Illinois, to the Richardson Drug Company, at Omaha, Nebraska, on or about the 1st day of November, 1912, and were received by said Richardson Drug Company at Omaha, Nebraska, 2nd day of November, 1912; it being claimed that said drug product is misbranded within the meaning of the food and drugs act of June 30, 1906, as amended, and same are now in my possession; and I do hereby give notice generally and to all persons having or pretending to have any right, title, interest or claim in said property, to appear in the said court, in the city of Omaha, Nebraska, in said district and division, on the 13th day of January, 1913, at 10 o'clock, in the forenoon of said day, then and there to make known their claim and allegations in said matter.

Dated at Omaha, Nebraska, this 23rd day of December, 1912.

WM. P. WARNER,
*United States Marshal for the
District of Nebraska.*

Endorsed: Filed Jan. 15, 1913. R. C. Hoyt, Clerk.

14 Thereupon afterwards, to-wit: On the 13th day of October, 1913, Demurrer was filed in said case, which said Demurrer is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

No. 105, Civil.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEVEN CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, Defendant.

Libel.

Demurrer.

The defendant the Eckman Manufacturing Company, says that the libel filed by the United States of America, in the above entitled cause is bad in substance in that:

1. The said libel does not state any ground in law or in fact for the seizure of the articles mentioned therein;

2. The said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein;

3. The said libel on its face shows that the said alleged statements charged to be false and fraudulent were not contained on any label or package;

4. The said libel shows on its face that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized, or of any of the ingredients or substances contained in said article;

5. That said libel does not state any fact upon which to base the conclusion that the said statement- mentioned in the said libel are false and fraudulent.

15 6. That the said libel does not allege any fact upon which to base a statement that the statements contained within the printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis;

7. The said Act of Congress approved August 23, 1912, is null, void, and of no effect, the said Congress of the United States being without the power or authority to enact the same;

8. The said Act mentioned aforesaid is unconstitutional in that it undertakes to regulate statements regarding the curative or therapeutic effect of an article which said statements are mere opinions, and the expression of said opinions can not be regulated by an Act of Congress.

DANIEL W. BAKER,
EDWARD M. MARTIN,
*Attorneys for Defendant Eckman
Manufacturing Company.*

Endorsed: Filed Oct. 13, 1913. R. C. Hoyt, Clerk.

16 Thereupon afterwards, to-wit: On the 29th day of November, 1913, that being one of the days of the September 1913 Term of said Court, held at the Court House in the city of Omaha, before Hon. Page Morris, the following among other proceedings were had in words and figures, to-wit:

105, Civil.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SIX CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alternative, a Drug Product, Defendant.

This cause came on to be heard on the application of the plaintiff, in open court, for leave to amend its Libel instantan by interlineation, by inserting on the eighth line of page 3 thereof, after the

semi-colon following the word "used," the following words: "as the said Eckman Manufacturing Company then and there well knew," and on the nineteenth line of the same page, following the word "consumption," the words: "All of which the said Eckman Manufacturing Company then and there well knew" and the court being fully advised concerning the same it is Ordered, that said amendments be and the same are hereby disallowed and said application overruled, to which the plaintiff excepts.

This cause came on further to be heard on the demurrer filed by the Eckman Manufacturing Company to the Libel of the plaintiff herein and was argued by counsel and the court being fully advised in the premises it is

Ordered, that said demurrer be and the same is hereby overruled to which order the Eckman Manufacturing Company excepts.

17 Thereupon afterwards, to-wit: On the 8th day of December, 1913, Election of the Defendant to Stand on Demurrer was filed in said case, which said Election is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

Civil, No. 105.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEVEN CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, a Drug Product, Defendant.

Libel.

Election of the Defendant to Stand on Demurrer.

Now comes the defendant, Eckman Manufacturing Company, by their attorneys, and excepts to the ruling of the court in overruling the demurrer filed by the said defendant to the libel in the above entitled cause, and elects to stand on the demurrer filed herein.

DANIEL W. BAKER,

EDWARD M. MARTIN,

Attorneys for Defendant.

Endorsed: Filed Dec. 8, 1913. R. C. Hoyt, Clerk.

18 Thereupon afterwards, to-wit: At the September 1913 term of said Court, and on the 8th day of December, 1913, Judgment of Condemnation was signed in said case, and filed on the 10th day of December, 1913, and duly entered of record in Journal No. 2 of said Court, to-wit:

United States District Court, District of Nebraska, Omaha Division.

Civil, No. 105.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEVEN CASES (More or Less), Each Containing Twelve Bottles of
Eckman's Alterative, a Drug Product, Defendant.

Libel.

Judgment of Condemnation.

This cause coming on to be heard on the libel filed in the above entitled cause, the demurrer thereto, the order of the court overruling the demurrer and the exception of the defendant to such order, and the election of the defendant to stand on said demurrer, and upon motion of the United States for judgment in said cause; and it appearing to the court that the court has overruled the demurrer filed by the said defendant, and the said defendant having elected to stand on said demurrer, and by such election said cause can not be further proceeded with except to judgment, and said demurrer admitting the facts in said libel as pleaded, and that by reason of the alleged facts in said libel set forth, the said articles mentioned therein so seized, are liable to condemnation and confiscation as provided in said Act of Congress; it is by the Court this 8th day of December, 1913,

19 Ordered, Adjudged and Decreed that the said seven cases, more or less, each original case being labeled as follows:

"Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food and Drug Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory, Philadelphia, Pa.—One Doz. Eckman's Alterative."

are misbranded within the meaning of the said Act approved June 30, 1906, as amended by the Act of Congress of August 23, 1912.

And it is further ordered that each and every one thereof be, and the same are hereby condemned, and shall be disposed of by destruction by the said Marshal of this District under such terms and conditions as will not violate the provisions of said Act;

Provided, however, that the said defendant, Eckman Manufacturing Company, may within sixty days from this judgment, or thirty days from any judgment affirming this judgment, pay the costs of this proceeding and redeem said goods by giving bond in the penal sum of two hundred and fifty dollars (\$250.) conditioned that the said goods so seized and condemned shall not be sold or otherwise disposed of contrary to the provisions of this Act.

It is further ordered, that the said defendant, Eckman Manufacturing Company, pay the costs of this proceeding.

By the Court.

PAGE MORRIS, *Judge*.

O. K.

HOWELL.

Endorsed: Filed Dec. 10, 1913. R. C. Hoyt, Clerk.

20 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Assignment of Errors was filed in said case, which Assignment of Errors is in words and figures following, to-wit:

In the United States District Court, District of Nebraska, Omaha Division.

Civil, No. 105.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SEVEN CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Defendant,
and

THE ECKMAN MANUFACTURING CO., Owner, Defendant.

Assignment of Errors.

Now comes the Eckman Manufacturing Company, defendant in the above entitled cause, made so by order of Court, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the United States District Court, District of Nebraska, Division of Omaha, in the above entitled cause (and without prejudice) assigns error as follows:

1. That the Court erred in not holding the said Act of Congress of June 30, 1906, as amended by the Act of Congress of August 23, 1912, unconstitutional, null and void, and without the power of Congress to enact the same.

2. That the Court erred in holding the said Act of Congress aforesaid amended as aforesaid unconstitutional in that it undertakes (if the construction is given as claimed for by the United States and held by the Court) to regulate statements which are within a package and that do not become known to the purchaser until the said package has been purchased by the purchaser and entered into domestic commerce.

21 3. That said Act mentioned as aforesaid and amended as aforesaid is unconstitutional in that it undertakes to regulate statements regarding the curative and therapeutic effect of the articles, which said statements are mere opinions, and the expressions of said opinions can not be regulated by an Act of Congress.

4. That said Act is unconstitutional as amended in that it does

not come within the power of Congress, under the provisions of the Constitution "to regulate commerce with foreign nations and among the several states."

5. That said Act as aforesaid as amended aforesaid is unconstitutional in that it is violative of the Fifth Amendment, which is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

in that it attempts to deprive the defendant of his property without due process of law.

6. That said Act of Congress as amended is unconstitutional in that it is violative of the Sixth Amendment of the Constitution, which is as follows:

22 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

because it attempts to punish one for making statements regarding the curative and therapeutic effect of an article, which said statements are mere opinions.

7. That the said Act as amended is unconstitutional and in violation of the Sixth Amendment because by reason of the subject matter thereof, the said defendant is not informed of the nature and cause of the action against it by said Act as amended as aforesaid.

8. That said libel does not state any ground in law or in fact for the seizure of the articles mentioned aforesaid.

9. That said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein.

10. That said libel on its face shows that the said alleged statements charged to be false and fraudulent were not contained on any label or package.

11. That said libel shows on its face that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized or of any of the ingredients or substances contained in said article.

23 12. That said libel does not state any fact upon which to base the conclusion that the said statements contained in the said libel are false and fraudulent.

13. That the said libel does not allege any fact upon which to

base a statement that the statements contained within the printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis.

Wherefore, on account of said manifest error and each of them the said defendant the Eckman Manufacturing Company prays that the said judgment of the said District Court of the United States may be reviewed by the Supreme Court of the United States, and that the said District Court may be reversed, and said demurrer filed in the said District Court be sustained; and said libel be dismissed and the goods seized under said libel be returned to the said defendant, the Eckman Manufacturing Company.

DANIEL W. BAKER,
FRANCIS D. WEAVER,
EDWARD M. MARTIN,

*Attorneys for Eckman Manufacturing Company,
Defendant and Plaintiff in Error.*

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

24 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Petition for Writ of Error was filed in said case, which said Petition is in words and figures following, to-wit:

In the United States District Court, District of Nebraska, Omaha Division.

Civil, No. 105.

UNITED STATES OF AMERICA, Plaintiff,
vs.

SEVEN CASES (More or Less), Each Containing Twelve Bottles of
Eckman's Alterative, Defendant,
and

THE ECKMAN MANUFACTURING CO., Owner, Defendant.

Petition for Writ of Error.

To the Honorable Judge Morris, Holding United States Court, District of Nebraska, Omaha Division:

Now comes the Eckman Manufacturing Company, defendant in the above entitled cause and owner of the goods mentioned in the libel seized in the above entitled cause, and says that on the 10th day of December, 1913, this court entered judgment therein in favor of the United States, by which said judgment the goods seized in the above entitled cause were condemned and costs awarded against this defendant and defendant says that the said judgment

of this court and the proceedings had prior thereto contained certain errors which were committed by the court to the prejudice of this defendant, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, the said defendant, the Eckman Manufacturing Company, prays that a writ of error may issue in this behalf from the Supreme Court of the United States for a correction of the errors so complained of, said errors being such that the defendant is
25 entitled to a writ from this court directly to the Supreme Court of the United States; that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States; that the penalty of the bond may be fixed by this Court; that citation may be granted and that such judgment may be reviewed and reversed.

DANIEL W. BAKER,
FRANCIS D. WEAVER,
EDWARD M. MARTIN,
Attorneys for Defendant,
Eckman Manufacturing Company.

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

26 Thereupon afterwards, to-wit: On the 15th day of December, 1913, a Writ of Error was allowed in said case, and a Citation duly signed, and returned and filed on the 15th day of December, 1913, with acceptance of service endorsed thereon, the following of which are the originals:

27 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States District Court for the District of Nebraska, Omaha Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for Nebraska, aforesaid before you, or some of you, between The United States of America versus Seven Cases (More or less), each containing Twelve Bottles of Eckman's Alternative, and the Eckman Manufacturing Company, a corporation, owner and defendant, a manifest error hath happened, to the great damage of the said Seven Cases (more or less), each containing Twelve Bottles of Eckman's Alternative and the said defendant, Eckman Manufacturing Company, a corporation, owner and defendant, (Civil Case numbered 105) as by its complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
*Clerk of the United States District Court
for the District of Nebraska, Omaha Division.*

Allowed by
PAGE MORRIS,
*Judge of the District Court of the United States
for the District of Nebraska, Omaha Division.*

[Endorsed:] 105 Civil. Writ of error. Filed at — M. Dec. 15, 1913. R. C. Hoyt, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court at my office in the city of Omaha this 3rd day of January, 1914.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
Clerk of said Court.

28

Original, 105.

UNITED STATES OF AMERICA, ss:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court of Nebraska, Omaha Division, in Civil Case numbered 105, wherein The United States of America is plaintiff and Seven Cases (more or less), each containing twelve Bottles of Eckman's Alterative, is defendant and

the Eckman Manufacturing Company is owner and defendant and plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Page Morris, Associate District Judge of the United States District Court of Nebraska, Omaha Division, this 15th day of December, in the year of our Lord one thousand nine hundred and thirteen.

PAGE MORRIS,

*Judge of the District Court of the United States
for the District of Nebraska, Omaha Division.*

105 Civil. Filed at — M. Dec. 15, 1913. R. C. Hoyt, clerk.

Service of the within Citation is hereby accepted this 15th day of December, A. D. 1913.

UNITED STATES OF AMERICA,

Plaintiff,

By F. S. HOWELL,

*United States Attorney for
the District of Nebraska.*

29 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Bond was filed in said case, which said Bond is in words and figures following, to-wit:

Know All Men By These Presents: That we, The Eckman Manufacturing Company, a corporation, and owner and defendant, as principal, and Southwestern Surety Insurance Company, as sureties, are held and firmly bound unto The United States of America, in the full and just sum of two hundred and fifty (\$250) dollars, to be paid to the said United States of America, or their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this eleventh day of December, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the United States District Court for the District of Nebraska, Omaha Division, in a suit depending in said court, between The United States of America, versus Seven cases (more or less) each containing twelve bottles of Eckman's Alternative, and the Eckman Manufacturing Company, owner and defendant (Civil case numbered 105) a judgment was rendered against the said Seven cases (more or less) each containing twelve bottles of Eckman Alternative, and the Eckman Manufacturing Company, owner and defendant, and the said Eckman Manufacturing Company, a corporation, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be

and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Eckman Manufacturing Company, owner and defendant, shall prosecute its judgment to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ECKMAN MAN'F'G COMPANY,
By THOS. T. ECKMAN, *Pres.* [SEAL.]

Attest: F. D. WEAVER, *Sec't'y*, [SEAL.]

SOUTHWESTERN SURETY INSURANCE
COMPANY,
By E. H. LUIKART, *Attorney in Fact.* [SEAL.]

Sealed and delivered in presence of-

F. D. WEAVER,
For Eckman M'fg Co.
WM. B. HUGHES,
For S. W. Surety Ins. Co.

[Seal Eckman M'fg Co.]
[Seal S. W. Surety Ins. Co.]

Approved by
PAGE MORRIS, *Judge.*

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

31 Thereupon afterwards, to-wit: On the 24th day of December, 1913, Præcipe for Transcript was filed in said case which said Præcipe is in the words and figures following, to-wit:

32 & 33 United States District Court, District of Nebraska, Omaha Division.

Case No. 106, Civil.

UNITED STATES OF AMERICA

vs.

SIX CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alternative.

Præcipe for Transcript.

To the Clerk of said Court:

Please prepare Transcript on writ of error to the Supreme Court of the United States, same to consist of the following:

1. Libel filed December 12, 1912,
2. Order of Seizure and to show cause, entered Dec. 12, 1912;

3. Warrant and Monition with Return of U. S. Marshal, and Proof of Publication, filed January 15, 1913;
4. Demurrer of Eckman Manufacturing Co. filed Oct. 13, 1913;
5. Order overruling Application of plaintiff for leave to amend Libel and overruling Demurrer, entered Nov. 29, 1913;
6. Election of Eckman Manufacturing Co. to stand on Demurrer, filed Dec. 8, 1913;
7. Judgment of condemnation, entered Dec. 10, 1913;
8. Assignment of Errors; Petition for Writ of Error; Writ of Error; Bond; Citation, and Clerk's certificate to Transcript.

ECKMAN MANUFACTURING COMPANY,

By **DANIEL W. BAKER,**
EDWARD M. MARTIN,

Its Attorneys.

Endorsed: Filed Dec. 24, 1913. R. C. Hoyt, Clerk.

34 **UNITED STATES OF AMERICA,**
District of Nebraska, as:

I, R. C. Hoyt, Clerk of the District Court of the United States, for the District of Nebraska, hereby certify that pursuant to the foregoing Writ of Error, and in obedience thereto, and in compliance with the Præcipe, a copy of which is found on page 32 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Præcipe and as indicated in the foregoing Index, in the case of the United States of America, Plaintiff, vs. Seven Cases, (more or less) each containing 12 bottles of Eckman's Alternative, a drug product, No. 105, Civil Docket, and that copies of the Writ of Error and Citation, duly certified have been lodged and remain in my said office as such Clerk.

Witness my hand and the Seal of said Court, at Omaha, in said District, this 2 day of January, 1914.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT, Clerk.

Endorsed on cover: File No. 24,013. Nebraska D. C. U. S. Term No. 50. Seven cases (more or less), each containing Twelve Bottles of Eckman's Alternative, Ekman Manufacturing Company, owner, plaintiff in error, vs. The United States of America. Filed January 9th, 1914. File No. 24,013.